Supreme Court, U.S.
FILED
MAR 21 1996
CLERK

(3)

No. 95-1156

In the Supreme Court of the United States

OCTOBER TERM, 1995

MICHAEL B. LONDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

NINA GOODMAN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

18 pp

QUESTION PRESENTED

Whether, at petitioner's trial for failure to file a currency transaction report in violation of 31 U.S.C. 5313 and 5322, the jury was correctly instructed on the element of willfulness.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 4a-43a) is reported at 66 F.3d 1227.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1995. A petition for rehearing was denied on October 20, 1995. Pet. App. 1a-3a. The petition for a writ of certiorari was filed on January 18, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted on one count of conducting the affairs

of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); one count of conspiring to do the same, in violation of 18 U.S.C 1962(d); twelve counts of money laundering, in violation of 18 U.S.C. 1956(a)(1); twelve counts of failing to file currency transaction reports, in violation of 31 U.S.C. 5313 and 5322; one count of conspiring to commit extortion, in violation of 18 U.S.C. 1951; and two counts of aiding and abetting extortion, in violation of 18 U.S.C. 1951 and 2. After the jury verdict, petitioner pleaded guilty to one count of tax evasion, in violation of 26 U.S.C. 7201.[1] He was sentenced to 188 months' imprisonment, to be followed by 36 months' supervised release, and was fined $500,000. Pet. App. 47a. He also agreed to forfeit $865,000. The court of appeals affirmed.

1. Petitioner operated Heller's Cafe, a bar in Chelsea, Massachusetts, and ran a check-cashing service, known as M&L Associates, in the bar. Many of the patrons who frequented Heller's Cafe were bookmakers who operated illegal gambling businesses. M&L Associates cashed checks that bookmakers and their agents received from gamblers as payment for unlawful gambling debts, and it charged a commission on each check cashed. Pet. App. 5a-6a; Gov't C.A. Br. 3-4.

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[1] The judgment of conviction reproduced at Pet. App. 45a-46a does not accurately reflect the counts on which petitioner was convicted. He was convicted on Counts 1, 2, 5-18, 21, 23, 25, 26, 29, 32, 34, 35, 37, 40, 44, 45, 47, and 51 of the second superseding indictment. The government dismissed 18 additional counts prior to trial, and the district court dismissed Count 48. The jury acquitted petitioner on Count 4. See Gov't C.A. Br. 2-3. The district court's docket report accurately reflects the convictions.

As the operator of a check-cashing business, petitioner was required by federal law to file a currency transaction report (CTR) with the Internal Revenue Service each time he transferred more than $10,000 in cash to a customer. Pet. App. 6a; see 31 U.S.C. 5313(a); 31 C.F.R. 103.11(n)(3), 103.22(a)(1). Although petitioner regularly transferred cash in amounts of more than $10,000 to his check-cashing customers, before December 1986 he never filed CTRs that reported the transactions. In that month, a search warrant was executed at Heller's Cafe. After the search, he began filing CTRs on behalf of his check-cashing business. Pet. App. 6a-7a; Gov't C.A. Br. 5-6.

2. Evidence introduced at trial showed that, during the period in which he failed to file CTRs, petitioner was aware of the reporting requirement for transfers of more than $10,000 in cash. Pet. App. 8a; Gov't C.A. Br. 6-7. In a conversation recorded during court-authorized electronic surveillance at Heller's Cafe, petitioner explained the CTR requirement to one of his check-cashing customers, stating that "[t]he form is filled out by the one who cashed [the check]." *Id.* at 7. In addition, an employee of a bank where petitioner opened an account for his check-cashing business told petitioner that the bank would be "reporting any transactions in excess of $10,000," and petitioner responded that he "was aware of the law." *Id.* at 6-7. When an employee at a second bank where petitioner maintained an account advised petitioner that the bank would be "filling out CTR[s] on all his transactions over $10,000," petitioner stated that he was "familiar with the [CTR] form because his other banks filed them." *Id.* at 7.

The district court instructed the jury that, to convict petitioner on the counts charging him with

failing to file currency transaction reports, the government was required to prove that his failure to file CTRs for cash transactions involving more than $10,000 was "knowing and willful." Gov't C.A. Br. 48; 2/17/93 Tr. 67. The court explained that "[k]nowing in the context of this statute means [that] * * * [i]t has to be intentional, not by accident or mistake." 2/17/93 Tr. 67-68. The court then defined "willful" as follows:

> But willful, for the currency transaction reporting laws, has a somewhat different definition than it has in the other contexts I've described. It has a separate definition. It doesn't necessarily require actual direct knowledge of what the currency transaction laws require. In this context, a willful action is one that is committed in violation of a known legal duty, or as a result of a defendant's reckless disregard of such a duty.
>
> Thus, a failure to file is willful, if the defendant actually knew he was required to file a CTR in connection with a particular transaction and deliberately failed to do so. A failure to file is also willful, however, if the defendant was generally aware of the currency transaction reporting requirements but reckless[ly] or intentionally failed to investigate the legality of what he was doing.
>
> Recklessness involves the conscious disregard of a substantial risk.
>
> Thus, you should on this issue first decide whether the Government has proven the defendant actually knew he was required to file a CTR for

any proven particular reportable transaction and failed to do so.

If the Government has not proven this, but rather, you find the defendant actually thought, mistakenly, that the transaction was not reportable, you must then decide whether that mistake was the result of a reckless failure to determine properly how the currency transaction reporting laws apply to his conduct. And in addressing this issue of recklessness, if you reach it, you may consider the frequency with which the defendant was involved in transactions which might be reportable, among other things in evidence.

So, in this sense, the definition of willful is different than it was, for example, under the money laundering statute I described a little while ago. There, the actual knowledge that the checks were the proceeds of illegal activity was required and I told you that you were permitted but not required to infer such actual knowledge, if you found what the law calls willful blindness. That's one form of willfulness permitted under the CTR statute, but there's another form and that is the state of mind requiring that the CTR statute be met, if the Government proves a violation of a known legal duty, or a reckless disregard.

Gov't C.A. Br. 48-49; 2/17/93 Tr. 68-69. Petitioner did not object to that instruction, which was consistent with a recent en banc decision of the First Circuit, *United States* v. *Aversa*, 984 F.2d 493 (1993), vacated

and remanded *sub nom. Donovan* v. *United States*, 114 S. Ct. 873 (1994). See Pet. App. 27a.[2]

3. In the court of appeals, petitioner contended that the district court's instruction on willfulness was inconsistent with this Court's decision in *Ratzlaf* v. *United States*, 114 S. Ct. 655 (1994), which was issued after the trial. The government agreed that the willfulness instruction was inconsistent with *Ratzlaf*. Gov't C.A. Br. 50-52. The government argued, however, that because petitioner had not objected to the instruction, his claim was reviewable only for plain error, and that the defective willfulness instruction did not constitute plain error. Pet. App. 27a.

The court of appeals declined to apply the plain error doctrine. Pet. App. 27a-30a. It concluded that petitioner's failure to object to the willfulness instructions was excusable since those "instructions mirror[ed] exactly the holding" of *Aversa*. *Id.* at 29a.

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[2] Judge Torruella dissented from the en banc decision in *Aversa*, and argued that the element of willfulness required the government to prove an intentional violation of a known legal duty. 984 F.2d at 503-507. He relied on this Court's decision in *Cheek* v. *United States*, 498 U.S. 192 (1991), which had construed the element of willfulness in tax evasion cases. 984 F.2d at 505-506. Then-Chief Judge Breyer, in a concurring opinion, stated that, "[w]ere I writing on a blank slate," the similarity of the tax evasion and currency transaction statutes "might well lead me to conclude that the same standards should apply in both cases." He noted, however, that other circuits had distinguished currency reporting cases from *Cheek*, and he believed that this Court's decisions suggested that criminal tax cases were *sui generis*. He also concluded that a standard of recklessness that "involves the conscious disregard of a substantial risk" was sufficient to "avoid using the criminal law, in this technical area, to punish those with an innocent state of mind." *Id.* at 502-503.

It rejected the government's argument that a conflict in the circuits at the time of petitioner's trial on the construction of willfulness made it likely that this Court would resolve the issue and therefore made it incumbent upon petitioner to lodge an objection. *Id.* at 28a. According to the court, the fact that the law of the circuit "was settled by nothing less than a newly-minted *en banc* opinion at the time the trial judge instructed [petitioner's] jury * * * goes a long way, if not the whole way, towards excusing [petitioner's] failure to object." *Id.* at 29a-30a. The court also noted that, at the time of petitioner's trial, decisions of other circuits were even more favorable to the government than was *Aversa*, and it therefore concluded that *Ratzlaf* was "the type of unanticipated, 'out of the blue' Supreme Court ruling" that excuses a defendant's failure to object to instructions. *Id.* at 30a.

On the merits, however, the court concluded that the reference to "reckless disregard" in the willfulness instruction was "not error under *Ratzlaf*." Pet. App. 36a. It noted that, although this Court in *Ratzlaf* construed the element of willfulness to require "that the defendant acted with knowledge that his conduct was unlawful," the Court did not address any issue about recklessness and "neither embraced nor disavowed" the decision in *Aversa*. *Id.* at 30a-31a. The court of appeals also noted that, in numerous other contexts, willfulness embraces reckless disregard of the illegality of an act as well as intentional violation of the law. *Id.* at 34a-35a. And it observed that there are "practical problems of drawing too fine a line" between intentional violation of the law and reckless disregard, since a jury can generally infer knowledge "if a defendant consciously

avoided learning about the reporting requirements." *Id.* at 35a. That standard, the court concluded, was similar to the theory adopted in the instructions in this case, which defined recklessness as "the conscious disregard of a substantial risk," and required "some kind of an awareness of law which [was] not casually or negligently but recklessly disregarded." *Id.* at 35a-36a.

Petitioner filed a petition for rehearing and a suggestion of rehearing en banc; both were denied by the court of appeals. Pet. App. 1a-2a. Chief Judge Torruella dissented from the denial of further review. *Id.* at 2a. In his view, *Ratzlaf* precluded a conviction for violating the currency transaction reporting requirements "based on the 'reckless disregard' theory utilized in this case." *Ibid.* He also noted that this Court had remanded the en banc decision in *Aversa* for further consideration in light of *Ratzlaf*, and he concluded that "[t]he most logical inference from this state of affairs is that the Court viewed our pre-*Ratzlaf* decision in *Aversa* as contrary to *Ratzlaf*, and wanted to give us a chance to remedy it." *Ibid.*

ARGUMENT

Petitioner renews his contention (Pet. 4-5) that the district court's instruction on willfulness is inconsistent with *Ratzlaf* v. *United States*, 114 S. Ct. 655 (1994). According to petitioner (Pet. 4), the instruction incorrectly "equated 'actual knowledge' of illegality with 'reckless disregard' of the required legal duties." We believe that the judgment in this case is correct, and that petitioner's contention does not warrant review by this Court.

In *Ratzlaf*, this Court interpreted the element of willfulness in 31 U.S.C. 5322 to require proof that the

defendant knows that his conduct (there, structuring currency transactions) is unlawful. 114 S. Ct. at 658.[3] The Court therefore disapproved the conclusion of the lower courts in that case that the government "did not have to prove defendant knew the structuring was unlawful." *Id.* at 657. The Court also cited with approval several lower court decisions construing willfulness to require proof of a voluntary and intentional violation of a known legal duty (*id.* at 659-660), including a decision that relied for that formulation on *Cheek* v. *United States*, 498 U.S. 192, 201 (1991), in which the Court had so construed willfulness for purposes of criminal liability for tax evasion.

Ratzlaf did not specifically discuss whether proof of a defendant's reckless disregard for the illegality of his acts would satisfy the element of willfulness under Section 5322. Nor are we aware of any other federal appellate decision addressing the general issue of recklessness in this context since this Court's decision in *Ratzlaf*. Some courts have stated that, under *Ratzlaf*, the district court must instruct the jury that the element of willfulness requires proof that the defendant was aware that his conduct

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[3] *Ratzlaf* involved a violation of the provision of Title 31 that prohibited the structuring of a transaction "for the purpose of evading the reporting requirements." 31 U.S.C. 5324 (1988 & Supp. V 1993). This case involves a violation of a separate provision, 31 U.S.C. 5313, which requires the filing of a CTR. At the time of the decision in *Ratzlaf*, 31 U.S.C. 5322(a) (1988 & Supp. V 1993) imposed penalties for "willfully violating" either provision. Congress has since eliminated the willfulness element from the offense of structuring currency transactions that was at issue in *Ratzlaf*. See Pub. L. No. 103-325, § 411, 108 Stat. 2253; H.R. Conf. Rep. No. 652, 103d Cong., 2d Sess. 194 (1994). Congress has not, however, removed the element of willfulness from the offense involved in this case.

was unlawful, but those cases did not involve any question of recklessness. See *United States* v. *Retos*, 25 F.3d 1220, 1230 (3d Cir. 1994); *United States* v. *Jones*, 21 F.3d 165 (7th Cir. 1994); *United States* v. *Rogers*, 18 F.3d 265, 268 (4th Cir. 1994). And no decision has considered the unusual blend of instructions given here, in which some portions of the willfulness charge focused on petitioner's "conscious disregard of a substantial risk," while others permitted conviction even if petitioner "actually" but "mistakenly" (as "the result of * * * recklessness") thought that his conduct was lawful.

In our view, as we stated to the court of appeals (Gov't C.A. Br. 50-52), the instructions given by the trial court in this case, taken as a whole, are not consistent with *Raztlaf*. The court instructed the jury that it could find that petitioner acted willfully if it determined either that he knew that he was required to file CTRs, or that he was "generally aware of the currency transaction reporting requirements but reckless[ly] or intentionally failed to investigate the legality of what he was doing." The court further defined "recklessness" as involving "conscious disregard of a substantial risk." And the court also told the jury that it could convict petitioner if it found that he "actually thought, mistakenly, that the transaction was not reportable," provided that his mistake was the result of his "reckless failure to determine properly how the currency transaction reporting laws apply to his conduct." Gov't C.A. Br. 48-49; 2/17/93 Tr. 68-69.

It is, of course, proper to permit a jury to infer willfulness from a defendant's conscious avoidance of learning about the requirements of the law. See *United States* v. *Bank of New England*, 821 F.2d 844,

855 (1st Cir.), cert. denied, 484 U.S. 943 (1987); see also *Ratzlaf*, 114 S. Ct. at 663 n.19 ("[a] jury may, of course, find the requisite knowledge on defendant's part by drawing reasonable inferences from the evidence of defendant's conduct"). In this case, however, the instructions given by the trial court—especially the instruction that permitted a finding of willfulness based on petitioner's mistaken but reckless belief that his conduct was not covered by the statute—appear inconsistent with *Ratzlaf*'s requirement that "the Government must prove that the defendant acted with knowledge that his conduct was unlawful" (114 S. Ct. at 657).[4]

We nevertheless believe that the judgment is correct and does not warrant this Court's review. Petitioner failed to object to the jury instruction in the trial court. The court of appeals ruled that petitioner's failure to object was excusable because of its recent decision in *Aversa*, which supported the district court's instruction; it therefore declined to review the instruction under a plain error standard. We believe that the court of appeals' analysis is wrong, and that the court should have reviewed the

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[4] We do not agree with petitioner, however, that reversal is required because this Court vacated the judgment of the court of appeals in *Aversa* and remanded that case for reconsideration in light of *Ratzlaf*. See *Donovan* v. *United States*, 114 S. Ct. 873 (1994). The Court has recently explained that an order granting a petition for a writ of certiorari, vacating the judgment below, and remanding for reconsideration merely "assists this Court by procuring the benefit of the lower court's insight before we rule on the merits." *Lawrence* v. *Chater*, 116 S. Ct. 604, 606 (1996) (per curiam). The Court's vacatur of the judgment in *Aversa* did not constitute a ruling that the decision in that case was inconsistent with *Ratzlaf*.

instruction only for plain error. Under a correct application of the plain error standard, it should have affirmed the convictions.

At the time of petitioner's trial, an objection to the willfulness instruction would not have been futile, and petitioner did not "lack[] the tools" for making such an objection. Cf. *Engle* v. *Isaac*, 456 U.S. 107, 133 (1982). This Court had already construed willfulness in *Cheek* to require proof of the voluntary, intentional violation of a known legal duty, and all the opinions in *Aversa* acknowledged the significance of *Cheek*. See 984 F.2d at 497, 500-501; *id.* at 502-503 (Breyer, C.J., concurring); *id.* at 505-507 (Torruella, J., dissenting). Moreover, other circuits had construed Section 5313 to require proof that the defendant intended to disobey the law. See *United States* v. *Eisenstein*, 731 F.2d 1540, 1543 (11th Cir. 1984); *United States* v. *Granda*, 565 F.2d 922, 926 (5th Cir. 1978) (permitting defense based on "alleged ignorance of the reporting requirements"). The majority in *Aversa* permitted proof of willfulness through evidence of reckless disregard of the law (see 984 F.2d at 497-498) and distinguished *Cheek* on various grounds, but its extensive discussion of the issue should have suggested to petitioner that *Cheek* supported an argument that the element of willfulness required proof of a voluntary and intentional violation of a known legal duty. To preserve such an argument, petitioner should have objected to the district court's instruction.

Accordingly, under Rule 52(b) of the Federal Rules of Criminal Procedure, petitioner's conviction may be reversed only if it was a "plain error[] * * * affecting substantial rights." See generally *United States* v. *Olano*, 113 S. Ct. 1770, 1777-1778 (1993). "It

is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Id.* at 1778. That standard requires not only error, but also, *inter alia*, a showing that the defendant has been prejudiced and that the conviction would result in a miscarriage of justice.

Petitioner cannot make the necessary showing of prejudice in this case, for the evidence at trial demonstrated that he knew he was required to file CTRs for transfers of more than $10,000 in cash. When bank employees told petitioner that they would be filing CTRs for his transactions over $10,000, petitioner responded that he was aware of the law. Petitioner told a customer that "[t]he form is filled out by the one who cashed [the check]." He also instructed his customers to make sure that each check was for less than $10,000, and when he cashed a group of checks for the same customer, he would often deposit the checks on different days or in different bank accounts. And when petitioner learned that the authorities were "cracking down" on CTR violations, he began to stamp the back of his customers' checks with information that would have been contained in a CTR, so that, as he said, "when they come down at least I'll have some records on them." Gov't C.A. Br. 5-7, 52-54.

Even if the instruction were prejudicial, petitioner could not show that "a miscarriage of justice" resulted from his conviction, or that the instruction "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." See *Olano*, 113 S. Ct. at 1779. The evidence of petitioner's awareness of the law shows that the instruction did not result in the conviction of an actually innocent person. Moreover, no blame for the instruction can be placed on the

district court or the government, since the instruction was entirely consistent with the law of the circuit at the time of trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

NINA GOODMAN
Attorney

MARCH 1996